IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 37 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

ASHULAL NANJI BISNOL

Appearance:

MR SN SHELT ADVOCATE GENERAL with
MR BY MANKAD, APP for Petitioner
MR AD SHAH for Respondent No. 1
Respondents No. 2 & 3 served

CORAM : MR.JUSTICE J.R.VORA

Date of decision: /10/2001

C.A.V. JUDGEMENT

1. This Revision Application is filed by the State against the order passed by learned Addl. Sessions Judge, Mehsana, in Session Case No. 58 of 1990 during

deposition of witness PW 16 Exh. 126 Dr.Smt.S.L. Vaya, by which the learned Addl. Sessions Judge observed that the statements recorded by this witness of the accused respondents are confession in nature and, therefore, are not admissible and further that the witness had no authority under the provisions of the Criminal Procedure Code to obtain statements of the accused and therefore the learned Addl. Sessions Judge held that the statements recorded by this witness were not admissible and further the learned Addl. Sessions Judge closed the evidence of witness and hence the State has filed this Revision Application against the said order passed on 5th of December, 1991 during the deposition of the above said witness.

2. The facts go to show that the present respondent along with other accused are charged under the provisions of Narcotic Drugs & Psychotropic Substances Act, 1985 and are being tried by the learned Addl. Sessions Judge, Mehsana in Sessions Case No. 58/90. It is the case of the prosecution that the present three respondents during Police remand were subjected to "Lie Detection Test" carried out by Dr. Smt.S.L.Vaya, PW16, Exh.l26. While deposition was being recorded in examination-in-chief, the objection was raised that the statements recorded by PW16 is confessional in nature and she had no authority to record the statements of the accused though it was urged on behalf of the prosecution that the evidence was relevant under Section 45 of the Indian Evidence Act but the learned Addl. Sessions Judge not only held that the statements of the accused were inadmissible but closed the evidence of the witness PW16 at that stage.

3. Learned Advocate General Mr. S.N. Shelat was heard on behalf of the State - petitioner and learned Sr. Advocate Mr. A.D. Shah was heard on behalf of respondent No.1. While learned advocates for respondents No. 2 and 3 are not present.

4. Learned Advocate General Mr. Shelat raised two contentions. First was regarding the stage at which the Court should decide the objections raised during recording of evidence. It was contended that it was obligatory for the learned Additional Sessions Judge first to record the evidence fully and then to come finally at the conclusion that what evidence is admissible and relevant. It was utterly erroneous as contended by learned Advocate General Mr. Shelat that at this stage for the learned Addl. Sessions Judge to come to the conclusion while recording the evidence that the statements were not admissible and that it was also

utterly erroneous to close the evidence of PW16. The other contention which Mr. Shelat urged was in respect of the legal aspects that the evidence of PW16 was relevant under Section 45 of the Indian Evidence Act as well as Section 293 of the Criminal Procedure Code sub-sec. (4)(e) and it was also urged that PW16 is not a Police Officer and, therefore the statements recorded by her of the present respondent is not hit by Section 25 or 26 of the Indian Evidence Act. Learned Advocate General Mr. Shelat contended that the statements were relevant and admissible as extra judicial confession. At last, it was urged that learned Judge ought to have allowed to continue the deposition and take the evidence on record and thereafter ought to have come to the conclusion that which part of the evidence is relevant and admissible and which part of the evidence is not relevant and inadmissible. For the contention regarding the stage at which the Court is required to decide the objections, learned Advocate General relied on a decision of the Supreme court in the matter of BIPIN SHANTILAL PANCHAL vs. STATE OF GUJARAT, reported in 2000 (2) GLH, 545, wherein the Supreme Court deprecated archaic practice of Trial Courts not to proceed further without passing order on an objection regarding admissibility of any material in evidence and, therefore, the Supreme court directed that whenever an objection is raised during evidence regarding the admissibility of any material or item of oral evidence, the Trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case and subject to such objections to be decided at the last stage in the final judgment. For the contention on merits regarding the admissibility of the statements of the accused, learned Advocate General relied upon a decision of the Supreme Court in the matter of PON ADITHAN vs. DEPUTY DIRECTOR, NARCOTICS CONTROL BUREAU, MADRAS, reported in AIR 1999 SC 2355 wherein confession before the Intelligence Officer was held relevant and the decision of this Court in the matter of TRIKAMBHAI @ TIKO RAVAJIBHAI THAKOR vs. STATE OF GUJARAT, reported in 2001 (1) GLH 177 wherein a statement of the accused before the Doctor even if the accused was in custody was held admissible. Learned Advocate General also relied upon a decision of this court in the matter of RAJAN JOHNSONBHAI CHRISTIE vs. THE STATE OF GUJARAT, reported in 1997(1) GLH 799 and submitted that Lie Detection Test is a scientific test and expert be allowed to depose and if any objection is raised, the same can be finalised as directed by the Supreme Court in Bipin Shantilal Panchal's case (supra). It was urged that therefore the order impugned of the learned Addl. Sessions Judge concluding that the statements of the

accuses are not relevant and thereby closing the evidence is erroneous, illegal and incorrect.

5. As against this, learned Advocate Mr. A.D. Shah for respondent No.1 vehemently urged that the order impugned is an interlocutory order and Revision cannot lie against such order. The witness PW 16 failed to depose the foundation which is required to be led by the prosecution on the subject of Lie Detection Test nor any procedure or method of conducting such test has been deposed and, therefore, it can be concluded that PW 16 is not an expert witness under Section 45 of the Indian Evidence Act. It was urged that from whatever is recorded by the learned Addl. Sessions Judge, it is clear that the accused present respondents were in Police custody, the Police have prepared the questionnaire to ask to the respondents by PW16. It is also disclosed that the respondents were under tension of remand and were not prepared to open their mouth and in the absence of provisions permitting recording of the confessional statement by PW 16 under the guise of so called Lie Detection Test, the statements recorded are in clear violation of Sections 25 and 26 of the Evidence Act and could not be said to be relevant or admissible evidence. For this, learned Advocate Mr. Shah has relied upon a decision of the Supreme Court in the matter of KISHORE CHAND v. STATE OF HIMACHAL PRADESH, reported in AIR 1990 SC 2140, wherein it has been held that Extra judicial confession recorded while the accused was under Police custody is hit by Sections 25 and 26 of the Indian Evidence Act. Learned Senior Counsel Mr. Shah relied upon Section 136 of the Evidence Act and submitted that the Judge would admit that evidence only, which he thinks that the same is relevant and admissible and can be proved. The other material cannot be placed on record for which the learned Advocate Mr. Shah has relied upon a decisions of (i) the Privy Council in the matter of SRIS CHANDRA NANDY vs. RAKHALANANDA THAKUR, reported in AIR 1941 Privy Council, 16; (ii) the Lahore High Court in the matter of B.N. KASHYAP vs. EMPEROR, reported in AIR (32) 1945 Lahore 23; (iii) the Patna High Court in the matter of MT. KHEDIA vs. MT. TURIA, reported in AIR 1962 Patna 420 and (iv) the decision of this Court in the matter of MIYANA HASAN ABDULLA vs. STATE OF GUJARAT, reported in AIR Guj. 214 and has submitted that evidence under Section 136 of the Act would be relevant and admissible which the Judge finds that the same material is relevant and admissible. When statutes according to Mr. Shah provides express provisions for admissibility and relevancy of the evidence and the manner and method of recording of the same, no court can record the

evidence in different manner than provided by the statute. It was urged that the learned Addl. Sessions Judge was correct in discarding the confessional statements of the accused and since no foundation for the expert evidence was laid down, the learned Addl. Sessions Judge was correct in closing down the evidence of PW16 and no interference of this Court is called for. It was vehemently urged that the decision of the Apex Court in the matter of Bipin Shantilal Panchal (supra) will not be applicable to this case because the same is not establishing any ratio decidendi under Article 141 of the Constitution of India. Learned Advocate Mr. Shah in this respect has relied upon a decision of the Apex Court in the matter of UNION OF INDIA vs. DHANWANTI DEVI, reported (1996) SCC 44, relying upon para 9 and 10 of the decision, it was urged that the enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. It was submitted that it is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent. It was urged that to understand and appreciate the binding force of decision, it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. Relying on this principle as laid down by the Apex Court in the above said decision, it was further urged that Bipin Shantilal Panchal vs. State of Gujarat (supra) the stage of deciding the objection during evidence was not the point in issue involved, but the point which was involved in the above said matter, whether extension to be granted to the Trial Court for completing the trial and, therefore, the decision of the Apex Court regarding disposal of the objection during evidence at final judgment is not binding precedent under Article 141 of the Constitution of India. It was urged therefore that the Judge will have to decide as per Section 136 of the Indian Evidence Act that the evidence proposed by the party, if proved, would be relevant and admissible. It is urged that this is to be decided by the Courts while the objection is raised and the court record cannot be encumbered by irrelevant material and this is the purpose behind the provision of Section 136 of the Indian Evidence Act.

6. Having heard learned counsels as above said, it clearly appears that serious error has been committed by the learned Addl. Sessions Judge in firstly discarding the statements of the respondent, may it be, confessional

from taking the same on the record and secondly the error learned Addl. Sessions Judge committed was regarding dropping down the shutters of recording of the evidence of PW-16. It clearly appears that the facts of the case are clearly covered by the decision of the Apex Court in Bipin Shantilal Panchal's case (supra). Therefore, we shall decide as to whether the order of the learned Addl. Sessions Judge at this juncture deciding the objection is proper or not. This Court cannot accept the contention of the learned advocate for respondent No.1 that what is decided regarding the stage of recording of the evidence in Bipin Shantilal Panchal's case (supra) by the Apex Court is not ratio decidendi and binding precedent under Article 141 of the Constitution of India. Even applying the principle as laid down by the Supreme Court in the matter of Union of India vs. Dhanwanti Devi (supra), as referred by the learned Advocate for the respondent No.1 what is decided by the Apex Court in Bipin Shantilal Panchal's case (supra) is ratio decidendi and has binding effect under Section 141 of the Constitution of India. Not only the question of extension of period for the completion of trial was under consideration of the Supreme Court but the very vital question of speedy trial in the Trial Court was under consideration before the Supreme Curt and, therefore, the Supreme Court was pleased to open the judgment in following words :

"1. This is yet another opportunity to inform the trial courts that despite the procedural trammels and vocational constraints we have reached a stage when no effort shall be spared to speed up trials in the criminal courts. It causes anguish to us that in spite of the exhortations made by this Court and a few High Courts, time and again, some of the trial courts exhibit stark insensitivity to the need for swift action, even in cases where the accused are languishing in prisons for long years as undertrials only on account of the slackness, if not inertia, in accelerating the process during trial stage.

Therefore, what is decided by the Supreme Court in paras 13, 14,15 and 16 is not a passing observations but deliberate judicial decision on consideration of point involved in the matter always vital one regarding the speedy trial of the undertrial accused in the Trial Courts. Not by a whisper, it could be said that the decision of the Apex Court in Bipin Shantilal Panchal's case (supra) has no binding effect. In para 13, 14, 15 and 16, the Supreme Court has observed as under :

"13. It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fail out of the above practice is this : Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the Appellate or Revisional Court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the Appellate Court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves? Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.

14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage the objection so raised is sustainable, the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

15. The above procedure, if followed, will

have two advantages. First is that the time in the trial court, during evidence taking stage, would not be wasted on account of raising such objection and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding that objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

16. We, therefore, make the above as a procedure to be followed by the trial courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence."

7. True it is that the courts must admit the evidence in the manner and method which is prescribed by the Indian Evidence Act. No courts can hold different procedure than laid down by the Indian Evidence Act, only relevant and admissible evidence can be proved and inadmissible or irrelevant evidence cannot be proved. Indian Evidence Act nowhere lays down that when objection about the irrelevancy and admissibility was raised, is to be decided by the court then and there and to proceed further thereafter for recording of evidence. There is no express or implied mandate in this respect laid down by the Indian Evidence Act . By phrase "admissible and relevant", it clearly means that admissible for the consideration of the judge, "admissible and relevant" for the consideration of the judge to pronounce the judgment. It cannot be laid down therefore that the statements or documents which are not admissible or relevant, cannot be taken on the record. It is nowhere provided by the Indian Evidence Act that the material which the judge thinks not relevant or inadmissible, cannot be brought on record. Evidence and material which may not be relevant or admissible cannot be precluded from placing on record. On the contrary it is more desirable to preserve it on record because as said by the Supreme Court in Bipin Shantilal Panchal's case that how Appellate or Revisional cannot come to the conclusion without that material on record, whether the Trial Court has rightly exercised the discretion. Therefore, the conducive procedure must be

to record the evidence and put a note of objection raised and decide the same at the final judgement and that is what decided by the Supreme Court and directed in the above said Bipin Shantilal Panchal's case (supra). The procedure as prescribed and directed by the Apex Court is in consonance with the provisions of the Indian Evidence Act. The principle that the Judge should take into consideration only the admissible and relevant evidence cannot be combated with and the Supreme Court in the above said decision of Bipin Shantilal Panchal has not discussed this aspect. The Supreme Court has only laid down that for the speedy trial, it is necessary that the Judge should record the evidence completely including the objection raised and decide at final stage that what material could be admitted and said to be relevant for pronouncement of the judgment and therefore in this view of the matter the order of the learned Addl. Sessions Judge closing down the evidence and to conclude at the recording of the evidence stage that those statements were inadmissible in evidence is clearly in breach of the direction of the Apex Court in Bipin Shantilal Panchal's case (supra).

8. The facts go to show that the witness is yet to be examined fully, the prosecution has not been given chance to lay down the foundation to declare that PW-16 is an expert witness. What is stated by PW-16 is her qualification and the fact that the accused were brought before her and one of the accused consented to go for the Lie Detection Test. Now at this juncture before the witness proceeds further the defence and the court jumped to the conclusion that the statements recorded by PW-16 were inadmissible and, therefore, her evidence was closed by the learned Addl. Sessions Judge. Even, the statements which were held irrelevant and inadmissible were not allowed to be brought on the record and, therefore, as has been apprehended by the Supreme court in Bipin Shantilal Panchal's case has taken place in this case that this court is deprived of the material which is held inadmissible by the Trial Court. The order, therefore also, is required to be quashed and set aside.

9. The law is now well established that the orders which affects the rights of the parties ultimately are the final orders may have been passed at the interlocutory stage, Revision Application is maintainable against such orders. Order which is impugned certainly goes to the root of the matter and since the evidence of PW-16 is closed by the learned Addl. Sessions Judge, the same affects the rights finally of the prosecution and, therefore, the order impugned cannot be said to be an

interlocutory order.

10. The arguments advanced on merits in view of what is discussed above in respect of whether the statements are relevant or irrelevant as Extra-judicial confession requires no adjudication by this Court at this juncture. It will be for the Trail Court to decide as directed by the Apex Court.

11. In this view of the matter while setting aside the order impugned, the Trail Court is directed to resume the evidence of PW-16 from the stage where it has been closed. The Trail Court shall give an opportunity to the prosecution to lay down foundation for PW 16 to be an expert witness in Lie Detection Test. The Trial Court shall also give an opportunity to the prosecution to place on record data and material in respect of Lie Detection Test. If the prosecution projects the witness as an expert, then it will be the duty of the prosecution to lay necessary foundation for the same. If any objection in respect of the recording of the evidence or in respect of any document which may be produced by this witness or prosecution, is raised by any of the partes, the Trial Court shall decide the same as directed by the Apex Court in Bipin Shantilal Panchal's case.

12. In this view of the matter with the above said directions to the Trail Court, this Revision Application is allowed and the order impugned is set aside. Rule is made absolute to that extent.

(J.R. Vora, J.)
p.n.nair

Dt: 3.11.2001

At this juncture, learned Advocate Mr. A.D. Shah submits that the interm relief be extended for futher period. Upon his request, interim relief granted in the matter is extended for three weeks from today.

Dt: 3.11.2001 (J.R. Vora, J.)